

Internal Revenue Service

memorandum

CC:TL:Br3

GEBowden

date: APR 3 1991

to: District Counsel, San Francisco W:SF

from: Chief, Branch 3, Tax Litigation Division CC:TL:Br3

subject: Request for Tax Litigation Advice
Re: Decision Document Preparation

Your memorandum of December 27, 1989 requested Tax Litigation Advice.

ISSUE

Whether, in a case where only a portion of the deficiency in tax is subject to the interest component of the addition to tax for negligence, pursuant to I.R.C. § 6653(a)(1)(B), or the increased rate of interest, pursuant to I.R.C. § 6621(c), the decision document should specify the portion of an interim payment that has been applied to the portion of the deficiency subject to the addition or the increased rate of interest.

CONCLUSION

The application of interim payments to portions of a deficiency subject to the § 6621(c) increased rate of interest should not be specified in a decision document because the Tax Court is without jurisdiction to consider the application of such payments at that time. The application of the interim payments are more properly the subject of stipulation. There is no need to include the application of interim payments to portions of a deficiency subject to the § 6653(a)(1)(B) addition to tax in the decision document, because it is Service position that such payments are not to be taken into account in the computation of that addition.

DISCUSSION

As a preliminary, we note that both code sections referred to have been removed from the Internal Revenue Code. Section 6621(c) was removed by P.L. 101-239 for returns with due dates after December 31, 1989. Section 6653(a)(1)(B) was removed by P.L. 100-647 for returns with due dates after December 31, 1988. We further note that one of the reasons behind the removal of the time sensitive component of the addition to tax for negligence was the difficulty of its computation.

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Your memorandum assumes that these two code sections must be treated similarly. We conclude that they should be treated similarly, at least with respect to the issue raised, but do not believe that similar treatment can be lightly assumed. One subsection relates to the computation of interest, the other is a penalty, albeit based on an amount of interest.

The analysis for the § 6621(c) increased rate of interest seems relatively clear. Elements of a petitioner's tax liability over which the Tax Court has no jurisdiction may not be included in the decision document. Except as provided by I.R.C. § 7481(c), the Tax Court is generally without jurisdiction to consider the computation of interest. LTV Corp. v. Commissioner, 64 T.C. 589 (1975). It is true that the Tax Court is allowed by § 6621(c)(4) to determine the amount of a deficiency to which the increased rate of interest is applicable, but this is a limited grant of jurisdiction. It does not, for example, allow the Service to issue a statutory notice of deficiency solely asserting the § 6621(c) additional interest. We do not read § 6621(c)(4) as allowing the Tax Court to determine how interim payments may be applied in computing § 6621(c) interest.

The recently enacted § 7481(c) does, however, provide the Tax Court with jurisdiction over interest determinations. By its language, the Tax Court's jurisdiction is restricted to assessments of interest subsequent to the entry of a decision of the Tax Court. Accordingly, we conclude that at the time the decision is entered, the Tax Court is without jurisdiction over the computation of the amount of § 6621(c) interest, and it is therefore inappropriate to include the application of interim payments in the decision document.

In passing, we note that there should be no question as to the proper application of interim payments with regard to § 6621(c) additional interest. As provided by Treas. Reg. § 301.6621-2T, A-11, interim payments are first applied to that portion of a taxpayer's liability not subject to the additional interest.

We now consider the § 6653(a)(1)(B) interest related component of the addition to tax for negligence. Unlike interest, the Tax Court does generally have jurisdiction to determine the amounts of additions to tax. However, the Service policy is that interim payments do not reduce the amount subject to the § 6653(a)(1)(B) addition to tax. IRM 4563.12. The addition is computed by taking 50% of the interest due on the portion of the underpayment attributable to negligence starting from the due date of the return and ending on the date of the assessment (or payment, whichever is earlier). The Manual apparently interprets "payment" to mean "full payment." Accordingly, the allocation of interim payments with respect to this addition to tax need not be included in the decision document because it is irrelevant.

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We recognize that as to the application of interim payments with respect to the § 6653(a)(1)(B) addition, there is limited guidance. There are no regulations, rulings, cases or legislative history on point. As provided by statute, the addition to tax is to be computed based on the amount of interest payable under I.R.C. § 6601. It seems arguable, therefore, that interim payments should be given effect just as they would be in a computation of interest payable under § 6601. We understand from anecdotal evidence that the addition to tax may be computed this way by some Service Centers. Because we believe that this issue has been insufficiently considered, and because of the apparent uncertainty in the field as to the proper approach to computation of this addition to tax, we have referred the matter to Technical for a more definitive pronouncement.

As discussed above, we conclude that the allocation of interim payments to the portions of an underpayment either subject to or not subject to increased interest is not appropriate in the decision document. We would not oppose, however, including such an allocation among the stipulations.

We will advise you of Technical's resolution of the allocation of interim payments with respect to the time sensitive component of the negligence addition. If you require further guidance, please contact George Bowden at FTS 566-3407.


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